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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

PATRICIA ROBERTS HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ANN HANSEN, RESPONDENT

NO. 80-1162

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, Ann Hansen, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case.

QUESTIONS PRESENTED

1. Whether the Secretary of Health and Human Services is required to follow a procedural rule set forth in the Social Security Claims Manual, if said rule affects Respondent's substantive rights regarding her entitlement to Social Security benefits, and if the Secretary's failure to follow said rule results in the Respondent's ineligibility for Social Security benefits.

2. Whether the Secretary of Health and Human Services may be equitably estopped from denying Social Security benefits to Respondent, who satisfies the substantive statutory eligibility requirements, where the sole basis for the denial is that the Respondent fails to satisfy a procedural requirement adopted by the Secretary, and the Respondent's failure to satisfy said procedural requirement is directly attributable to agency action in violation of a provision in the agency's internal manual affecting Respondent's entitlement to benefits.

ADDITIONAL REGULATIONS INVOLVED

1. Section 2003 of the Social Security Claims Manual provides in pertinent part:

> 2003. ADMINISTRATIVE POLICY ON ACCEPTANCE OF APPLICATION
>
> (a) General
>
> Where an individual is inquiring about possible current entitlement to [Retirement, Survivors (including Mother's) Disability, Health Insurance] benefits, his interest will ordinarily be best served by filing an application immediately so that retroactive Title II benefits will be better protected and a determination made on his entitlement. He will also have the right of appeal in the event he is not satisfied with the determination. The individual must make the actual decision of whether or not to file, but he should be fully informed of the application requirements and the advantages of filing. Unless filing is obviously disadvantageous or the question is one of filing for reduced Title II benefits only, it will be appropriate to suggest to the individual that he file an application. Resolve any doubtful situation in favor of suggesting that the individual file since he may withdraw his application later if he wishes.
> A delay in filing should never be suggested because there is no doubt as to the inquirer's eligibility or because extensive development may be necessary. An application should be obtained and development made for a determination. Do not deter an individual from filing solely on the basis that he is not eligible . . . This is true even where he

> is clearly ineligible. Every inquirer should receive an explanation of the application requirements and an application should be taken if he indicates that he wishes to file. If an individual makes no mention that he wishes to file but is not satisfied with the information about his eligibility, it should be suggested that he file an application so that a determination may be made.

STATEMENT

Although respondent is satisfied with most of the Statement of the Case presented by the petitioner, there are several points she would like to make.

First, the petitioner states that "Respondent did not claim, however, that she ever told the [Social Security] representative that her former husband, who would have been 43 years old at that time, was in fact dead." (Petition 6). Judge Friendly, in his dissent, repeatedly stresses this point in support of his argument that the claims representative's advice as to the Respondent's ineligibility was not wrong on the basis of what he knew of the facts as presented to him. (App. A of Petition at 15a, 16a, 25a, 27a-29a, 34a, 35a). This is simply erroneous as the Respondent testified at her hearing:

> Q. Do you remember exactly what he said?
> A. Yes, I do.
> Q. Tell me.
> A. I was very put out because of the questions -
> Q. Will you tell me what he said? Never mind about being put out.
> A. He said to me, "You were never married to the man, were you?
> Q. All right, then what else did he say?
> A. Then he - he said I was not illegible (sic) because I was divorced at the time of my husband's death. He said, "That's it, you were divorced. What was your marital statchus (sic)?"
> (emphasis added)
> (Tr. 61-62; Respondent's App. A, infra, 1a, 2a)

See also, Tr. 50-53; Respondent's App. A, infra, 3a-6a.

The statements at Tr. 50-53 by the Respondent regarding her marital status 'at the time', and indicating that the claims

representative told her that she was not eligible because she was 'divorced at the time', clearly referred to Respondent's marital status at the time of her husband's death. It might not be crystal clear if the record only contained Tr. 50-53, but since the record includes Respondent's testimony as set out at Tr. 61-62, it becomes undeniable that the Petitioner's statements on this point, and Judge Friendly's repeated reference to this fact, are erroneous. The ALJ made no specific finding on this point, probably because it was obvious. The record only supports a finding that the claims representative knew that Respondent's husband was dead at the time he spoke to Respondent. Indeed, implicit in the ALJ's findings is a finding that the Respondent was eligible for benefits at the time she spoke to the claims representative which would necessarily require a finding that her husband was dead. (App. A of Petition, 61a, 63a, 73a).

Although this factual dispute is not dispositive, it should be noted as it does form the basis for many of Judge Friendly's statements, particularly his argument that there was no misconduct or misinformation conveyed by the claims representative given what he knew of the facts as presented to him. In fact, Judge Friendly went so far as to suggest that the claimant <u>herself</u> did not even know that her husband was dead at the time she spoke to the claims representative (App. A of Petition 28a). This is completely erroneous, as the record clearly indicates that Respondent's two children, who were always living with her, applied for and started receiving Social Security benefits as soon as her husband died in 1967, and the only basis for their benefits was his death. Moreover, Respondent herself when she finally filed her written

application for benefits filed for benefits as a widow. (Tr. 57-58; 70; 74; Respondent's App. A, 7a-10a).

Concerning the question of Respondent's oral inquiry regarding her eligibility for benefits, the Petitioner's own written records document the visit, Tr. 112, and the ALJ made specific factual findings regarding: (a) the date and place of the visit; (b) that the Respondent went to apply for benefits; (c) that she was informed by the claims representative that she was not eligible for benefits; (d) that, in response to Respondent's question as to whether she should file an application, the claims representative replied that she was not eligible, and did not give her an application form, nor did he suggest or encourage her to file an application, nor did he explain the advantages of filing an application. (App. G of Petition, 61a-64a). These factual findings are supported by substantial evidence and were so found by the lower courts. (App. A of Petition 3a; App. E of Petition; 52a; 53a; 42 U.S.C. § 405(g)).

Finally, the Petition states that the "Court of Appeals conceded that the Claims Manual was not a legally binding regulation and that the representative's omission did not otherwise constitute affirmative misconduct". (Petition 8, see also, Petition 11-12n.7). It is suggested that this is not an accurate reading of the majority opinion. What the opinion states is ". . . [T]here was no finding of 'affirmative misconduct' if that term is defined to mean intentional violation of a rule having the force of law." (Emphasis added) (App. A of Petition 12a). Contrary to the contention of the Petitioner, the majority never indicated that affirmative misconduct is limited to an intentional violation of a rule

having the force of law, but stated" . . . Misinformation provided by a Government official combined with a showing of misconduct (even if it does not rise to the level of a violation of a legally binding rule) should be sufficient to require estoppel." (App. A of Petition 13a). Thus, it is submitted that the Court of Appeals did find affirmative misconduct in this case, and did not specifically answer the question of whether the Claims Manual is a rule binding on the agency but merely ruled that even if it is not, the same result obtains. All that was stated was that the Claims Manual does not have the force or effect of law as it is not a regulation published in the Federal Register. (App. A of Petition 11a).

The record establishes that the only reason why Respondent failed to file a written application during her first office visit was due to the failure of the claims representative to observe a mandatory and affirmative duty to encourage the filing of written applications. There is thus ample basis for the Court of Appeals' conclusion that the Respondent relied upon the misinformation provided by the claims representative and this constituted affirmative misconduct, justifying the application of estoppel against the Petitioner. (App. A of Petition, 10a; 13a; 14a).

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner sets forth three (3) basic reasons why a writ of certiorari should be granted: (1) The decision below cannot be reconciled with a long line of precedent in this Court that the government may not be estopped, unless, perhaps, the government has engaged in affirmative misconduct; (2) The decision below is in square conflict with the decisions of several other courts of appeals; and (3) The decision is important in that it threatens the sound administration of the Social Security program.

Respondent believes the Petitioner's statement of the Question Presented for Review is overly broad, and that the actual questions presented in the case are as stated by the Respondent, and, focusing on these questions, there is no basis upon which to grant the writ of certiorari.[1]

1. This Court has consistently held that federal agencies must follow their own rules and procedures, and are bound by them. See, e.g., CBS v. United States, 316 U.S. 407, 422 (1942); Morton v. Ruiz, 415 U.S. 199, 235 (1974); Accardi v. Shaughnessy, 374 U.S. 260, 265 (1954). Moreover, this Court has followed this holding even if the agency rules are not federal regulations published in the Federal Register, CBS v. United States, supra; Morton v. Ruiz, supra; Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 535 (1959), and even if the rules adopted were more rigorous than the law required. Morton v. Ruiz, supra, 415 U.S. at 235; Service v. Dulles, supra, 354 U.S. at 388; Vitarelli v. Seaton, supra, 359 U.S. at 539.[2] See also, Thorpe v. Housing Authority, 393 U.S. 268 (1969).

The basis for this rule was well stated in Morton v. Ruiz, supra, 415 U.S. at 235:

> "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."

At issue in Morton v. Ruiz, supra, was a regulation of the Bureau of Indian Affairs which denied General Assistance to Indians who did not live on reservations. This Court noted that

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[1]At the outset, it should be noted that in Weinberger v. Wiesenfeld, 420 U.S. 636, 640 n.6 (1975), this Court and the Petitioner gave tacit approval to oral applications for Social Security benefits.

[2]Thus, Judge Friendly's statement that an agency that issues instructions should not be held to a higher standard than an agency that does not, (App. A of Petition 30a), is in conflict with the cited decisions of this Court.

an unpublished provision of the Bureau's own internal Manual required that the challenged regulation be published, which it was not, Id. at 235, and thus this Court held:

> "Before the Bureau of Indian Affairs may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures."
>
> Id.

Here, the Petitioner is seeking to extinguish the rights of Respondent, who admittedly is otherwise eligible for Social Security benefits, solely on the basis of her failure to comply with the Petitioner's written application regulation, 20 C.F.R. § 404.601, when it is undisputed that the failure to do so was caused by the agency's own failure to follow section 2003 of its Claims Manual.

Since it cannot be denied that Section 2003 of the Claims Manual and the written application requirement are mutually interdependent, the Petitioner, under the clear language of Morton v. Ruiz, supra, cannot extinguish Respondent's entitlement to Social Security benefits when the agency itself caused her ineligibility by failing to follow its own internal procedures.[3]

Petitioner states that she is aware of no decision of this Court holding that an estoppel may lie against the government in any circumstance. Petition 11. Yet, Morton v. Ruiz, supra, and many of the cases previously cited can be viewed as estoppel cases (Morton v. Ruiz, supra - Government estopped from denying General Assistance benefits because it did not comply with its own internal manual in adopting the challenged regulation; Accardi v. Shaughnessy, supra - Government estopped from deporting alien because agency did not follow its own regulations; Service v. Dulles, supra - Government estopped from

[3]Even the court in Leimbach v. Califano, 596 F.2d 300, 302 n.1 (8 Cir. 1979) would concede that Respondent was eligible for the benefits in question, and that the written application merely affects the date of her entitlement.

discharging employee where internal procedure of agency manual was not followed; Vitarelli v. Seaton, supra - Government estopped from discharging employee where agency did not follow internal procedural manual). As Mr. Justice Frankfurter explained in his concurring opinion in Vitarelli v. Seaton, supra, 359 U.S. at 546, 547:

> "An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the regulations that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword."

If the preceding cases are not thought of as true estoppel cases, it is submitted that neither should the decision below. An alternative holding in this case, which the Respondent urged upon the Court of Appeals in her Brief at 8-9, would simply be that the Petitioner is bound to follow her own procedural rules, and action taken in violation of those rules, in this case the denial of Respondent's application for benefits for failure to file a written application when the failure was caused by agency action in violation of the Claims Manual, must be invalidated.[4]

Thus, it is submitted that the decision below is not inconsistent with the precedents of this Court, and falls routinely in line with the preceding line of cases.[5]

In a footnote, Petition at 13 n.8, Petitioner cites United States v. Caceres, 440 U.S. 741 (1979) for the proposition that

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[4]As noted earlier, the written application requirement and Claims Manual 2003 must be viewed as interdependent, as it is undeniable that they concern two aspects of the same issue.

[5]See also, Yellin v. United States, 374 U.S. 109, 114 (1963); Estep v. United States, 327 U.S. 114, 121 (1945).

the Claims Manual is not a legally binding regulation and that to hold an agency to a higher standard because it issues guidelines for its employees would have the deleterious effect of discouraging the promulgation of such guidelines. However, United States v. Caceres, supra, at 753 n.14, 19, cited approvingly the previously mentioned line of cases which included cases involving rules which were not legally binding, and which held an agency to a higher standard because it had promulgated rules. This Court distinguished those cases from Caceres, supra, by stating:

> "The APA authorizes judicial review and invalidation of agency action that is . . . taken 'without observance of procedure required by law.' Agency violations of their own regulations, whether or not also in violation of the Constitution, may well be inconsistent with the standards of agency action which the APA directs the Courts to enforce. Indeed, some of our most important decisions holding agencies bound by their regulations have been in cases originally brought under the APA. [Citations omitted].
>
> But this is not an APA case, and the remedy sought is not invalidation of the agency action." Id. at 753-754.

This case, however, is an APA case, as it is a direct appeal from an agency decision, and the remdy sought is invalidation of the agency action.[6] It is not critical that the agency rule that was violated here was not legally binding in

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[6] Morton v. Ruiz, supra; Accaidi v. Shaughnessy, supra; Service v. Dulles, supra; and Vitarelli v. Seaton; supra; were all appeals from agency decisions where the remedy sought was invalidation of agency action. It is clear that the Social Security Administration and Social Security appeals are covered by the APA. See, Blankenship v. Secretary, HEW, CCH Unemp. Ins. Reporter, Paragraph 15,884, n.5, (6 Cir. 1978); Caswell v. Califano, 583 F.2d 9, 15n.13 (1 Cir. 1978) "The Secretary's claim that the APA is not applicable to actions of the Social Security Administration is contrary to both the language of the statute and the case law of this and other circuits . . . We reject it." See, 5 U.S.C. § 551. See also, White v. Mathews, 559 F.2d 852, 861 n.12 (2 Cir. 1977). In fact, the Petitioner cited to the APA, 5 U.S.C. § 553, for the proposition that the Claims Manual is not legally binding, Petition 13n.8, so she would appear to admit, at least for the limited purpose of this case, that the APA does apply in determining whether an agency rule is binding.

the sense that it was not published in the Federal Register, as many of the previously cited cases involved similar rules, coming from internal agency staff manuals. See, Morton v. Ruiz, supra; Service v. Dulles, supra; Vitarelli v. Seaton, supra; Thorpe v. Housing Authority, supra.

Moreover, this Court has cited and relied upon provisions of the Social Security Claims Manual in Mathews v. Eldridge, 424 U.S. 319 336-338, 339-340 (1976) and Califano v. Yamasaki, 442 U.S. 682 686, 694 (1979). In both of these cases this Court held that prior hearings were not required before Social Security benefits were terminated or reduced because of certain Social Security procedural protections, many of which were contained in the Claims Manual. It would be inconsistent to rule that the Claims Manual was not legally binding on the agency, when important decisions of this Court are based upon the procedural protections found in the Claims Manual.[7] Although Judge Friendly disparagingly referred to the Claims Manual as a mere 'housekeeping' manual in his dissent below, App. A of Petition 30a, in other decisions he cited to the very same Claims Manual approvingly as indicative of various protections afforded to Social Security claimants. See, Mills v. Richardson, 464 F.2d 995, 998-999 (2d Cir. 1972); Frost v. Weinberger, 515 F.2d 57, 59-60, 68 (2d Cir. 1975).[8]

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[7] United States v. Caceres, supra, is not in any way inconsistent with these cases, as it never mentioned the Social Security Claims Manual, and this Court has never ruled that the Claims Manual is not binding on the Social Security Administration.

[8] 5 U.S.C. § 552 (a)(2)(C)(i) provides that provisions of agency staff manuals may be binding on a party if they have been indexed and either made available or published. Petitioner's own regulations indicate that the Claims Manual provision in question here comes within the statutory requirements, see 20 C.F.R. §§ 422.406(a)(4); 422.412; 422.430. Certainly, if the Claims Manual can bind a party, it is similarly binding on the agency. Thus, the suggestion that the only legally binding regulations are those published under 5 U.S.C. § 553 is incorrect.

The only exceptions this Court has recognized to the established doctrine that an agency is bound by its own regulations are when the regulation does not affect individual rights and is truly housekeeping, see American Farm Line v. Black Ball, 397 U.S. 532, 539 (1970), or in a criminal prosecution where the defendant seeks to expand the exclusionary rule by means of agency regulations. United States v. Caceres, supra. Neither of these exceptions are applicable here.

2. Even if the previously cited cases are not considered, the decision below is not inconsistent with the estoppel cases cited by Petitioner. See Petition at 11. None of these cases involved persons who were substantively eligible for statutory benefits, and whose entitlement was extinguished by agency action in violation of established agency rules, which were the dual conditions found by the Court of Appeals justifying the application of estoppel. (INS. v. Hibi, 414 U.S. 5 (1973) - No agency misconduct of any kind and thus no ground for ordinary estoppel, Montana v. Kennedy, 366 U.S. 308 (1961) - No agency misconduct of any kind and thus no ground for ordinary estoppel, and petitioner substantively ineligible for benefits sought; Automobile Club v. Commissioner, 353 U.S. 180 (1957) - Petitioner substantively ineligible for requested tax exempt status; FCIC v. Merrill, 332 U.S. 380 (1947) - Petitioner substantively ineligible for requested insurance; United States v. Stewart, 311 U.S. 60 (1940) - Petitioner substantively ineligible for requested tax exemption and no agency misconduct of any kind and thus no ground for ordinary estoppel; Wilber National Bank v. United States, 294 U.S. 120 (1935) - Petitioner substantively ineligible for requested insurance and no agency misconduct of any kind and thus no ground for ordinary estoppel; Utah v. United States, 284

U.S. 534 (1932) - No misconduct of any kind and thus no basis for ordinary estoppel; Sutton v. United States, 256 U.S. 575 (1921) - Petitioner substantively ineligible for relief requested and no agency misconduct of any kind and thus no ground for ordinary estoppel; Utah Power and Light Company v. United States, 243 U.S. 389 (1917) - Petitioner not substantively eligible to use land as requested; Pine River Logging Company v. United States, 186 U.S. 279 (1902) - Petitioner not substantively eligible to use land as requested; Hart v. United States, 95 U.S. 316 (1877) - Petitioner not substantively eligible for tax exemption).

The issue of substantive eligibility is important to all of these decisions. The case principally relied upon by both the Petitioner, and Judge Friendly in his dissent, is FCIC v. Merrill, supra, 332 U.S. at 385, where it was stated that it is ". . . [T]he duty of all courts to observe the conditions defined by Congress for charging the public treasury."

Here, as the court of appeals so compellingly noted, Respondent met the substantive conditions defined by Congress for charging the public treasury, and is among the class of persons Congress intended to benefit by its enactment of the Social Security program in question. (App. A of Petition 12a, 44a-46a). In response to Petitioner's argument that this decision will lead to the draining of the public fisc, Respondent submits that the limited nature of the decision, benefiting only those who are substantively eligible, will " . . . [n]ot drain the public fisc of $1.00 that is being spent either in excess of anticipated benefit levels or contrary to a substantive policy decision of the Congress." (App. A of Petition 46a).[9] Thus, the decision below is not "judicial legislation", but, rather

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[9]As noted earlier, supra n.3, it is not disputed that the Respondent was eligible for the benefits in question, and the written application requirement merely affects the date of her entitlement.

implements both the statute and congressional intent.

It is important to note that the only basis for the denial of benefits here was the Respondent's failure to satisfy a procedural regulation adopted by the Petitioner and not by Congress. All that Congress required in the statute was an application for benefits, and Congress' language is susceptible to an interpretation of either an oral application or a written application, as shown by the fact that the Petitioner in the past by regulation allowed oral applications and at the present time requires written applications. (See App. A of Petition 8a). This is not to suggest that the written application regulation is invalid or unreasonable, but simply to point out that Congress' mandate was simply that an application be filed, and that Petitioner herself has interpreted the statute at various times to allow both oral and written applications.

Petitioner argues that the written application requirement itself is a substantive policy decision of Congress.[10] As just noted this is not the case. Moreover, under principles set forth in Guaranty Trust Company v. York, 326 U.S. 99, 108-109 (1945) it is clear this is not so because the requirement is more closely analogous to the "means by which a right to recover . . . is enforced."

Respondent submits that the decision below is thus not in conflict with any of this Court's estoppel cases. See also, Moser v. United States, 341 U.S. 41 (1950).

3. Petitioner alleges that the decision below is in square conflict with the decisions of several other courts of appeals. This is not so. In Gressley v. Califano, 609 F.2d 1265

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[10] It should be noted that in Dziorny v. Secretary of HHS, No. 80-C0729 (ED NY Oct. 20, 1980), the Secretary admitted that the written application required was only a procedural requirement. Transcript of Court's opinion at 5.

(7th Cir. 1979) the Social Security claimant was not and had never been substantively eligible for benefits, and the court raised the question of whether the facts alleged were sufficient to create an estoppel even if estoppel could apply to the government. Moreover, the issue of the agency's noncompliance with its own regulation (i.e. Claims Manual § 2003), was not raised.

In Simons v. Califano, 593 F.2d 121 (9th Cir. 1979), in a brief per curiam opinion, the court held estoppel not to apply because there was no showing of any government misconduct. Once again, the issue of the agency's noncompliance with its own regulations was not raised. Moreover, the claimant in Simons did file a written application at the time in question and was also at least partially at fault in not reading the application form to catch the error. The Simons decision cannot fairly be construed as the Ninth Circuit's rejection of the principle that the government can be estopped in appropriate cases. See, California Pacific Bank v. Small Business Administration, 557 F.2d 218 (9th Cir. 1977); United States v. Lazy F.C. Ranch, 481 F.2d 985, 989 (9th Cir. 1973); Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970).

In Leimbach v. Califano, 596 F.2d 300 (8th Cir. 1979), the court left open the issue of whether the government could be estopped if misconduct was shown, as the issue of the agency's noncompliance with its own regulation was not raised. Moreover, the court stressed the weakness of the facts and noted there was no substantial evidence to even support a finding that an oral inquiry was made.

Finally in Cheers v. Secretary, HEW, 610 F.2d 463 (7th Cir. 1979) cert. denied, No. 79-6856 (October 14, 1980), the court held

that there was no competent evidence of the alleged oral inquiry, and, once again, the issue of the agency's noncompliance with its own regulations was not raised. Moreover, in Petitioner's Brief in Opposition, at 6, arguing against granting a writ of certiorari in that case, Petitioner noted that the case did not involve a direct conflict with this case because of the absence of evidence of an oral inquiry.

Thus, on the facts and arguments presented in these four cases, there is no conflict with the holding in this case. None of the cases raised the issue of the agency's noncompliance with its own regulations, which is critical to a finding of a misconduct upon which the Hansen holding is based, and, in addition, the other decisions also involved claimants who were substantively ineligible for benefits (Gressley), or involved fact situations with inadequate proof of the alleged oral inquiry (Leimbach, Cheers).

On the law, the decision below is supported by the decisions in at least eight circuits, which have held that the government will be estopped in certain circumstances. See, App. A of Petition 37a-38a.

4. Finally, the Petitioner argues that the issue is important because it threatens the sound administration of the Social Security program and encourages groundless claims against the public treasury. Petition at 11, 17-19. In support of this it cites to five decisions subsequent to the decision below in which federal district courts have followed the ruling below.

It is submitted that these claims are groundless. Most significantly, the decision below is so limited in its application that none of the alleged harms can occur if the decision is

properly followed.[11] It must be stressed that the decision below is strictly limited to apply only where: (A) A claimant satisfies the substantive statutory eligibility requirements; and (B) The denial of benefits is based on a failure to satisfy a procedural requirement (written application) added by the agency and not Congress; and (C) The failure to satisfy the procedural requirement is caused by agency action in violation of the agency's own procedural manual; and (D) The procedural rule that is violated by the agency is directly related to the procedural requirement on which the denial was based; and (E) There is substantial evidence in the form of written agency records or otherwise, to document an oral inquiry regarding the claimed benefits by the claimant on a date certain; and (F) All the traditional requirements of estoppel are met.

If all of these conditions are satisfied, the only people who will gain from the decision are those whom Congress intended to receive benefits, and thus there cannot be a drain on the public fisc.

Moreover, the agency would have an effective means of rebutting fraudulent claims as the burden of proof would still be on the claimant to prove by substantial evidence the fact that an oral inquiry was made. If the oral inquiry cannot be verified, the claimant and not the agency would lose, under the decision below, as was the case in Cheers and Leimbach.

That this is quite manageable is borne out by examining the post-Hansen decisions cited by the Petitioner. In Golau v. Secretary, HHS, No. 79-3192 (DDC.May 29, 1980), there was written

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[11] Indeed, Judge Newman's concurrence below characterizes the substantive-procedural distinction set forth in the majority opinion as both an "explanatory" and a "limiting principle" in assessing the application of equitable estoppel against the government. The decisions of the District Courts referred to by Petitioner (Petition at 18) demonstrate the sound and measured exercise of judicial discretion in applying the principles of equitable estoppel established in Hansen to subsequent cases. See discussion, infra.

verification of the oral inquiry from the agency's own records, and there was competent evidence of government misconduct by the violation of an agency rule.[12] Similarly, in Braunstein v. Harris, 498 F. Supp. 1301 (DDC.1980), there was also written verification from agency records of the oral inquiry, and competent evidence of a violation of agency rules. In Coty v. Harris, 495 F.Supp. 452 (W.D. Va. 1980), the ALJ found as a fact that an oral inquiry was made on a date certain, and that there was competent evidence of agency misconduct by the violation of its own rules.[13] In Carpenito v. Secretary, HHS, No. 78-2798-K (D. Mass. May 29, 1980) there was evidence presented from witnesses of an oral inquiry regarding Social Security benefits, and the court simply remanded the case to the Secretary to make factual findings on whether an oral inquiry was made.

In Dziorny v. Secretary, HHS, supra, the court recognized the strict, limiting character of the Hansen decision requiring: reasonable reliance on misinformation from a government employee; a procedural, and not a substantive eligibility requirement in issue; and violation of an internal procedural manual or guide supporting an inference of misconduct. The court indicated that the record did not satisfy these criteria (the claimant appeared pro se) and simply remanded the case to the Secretary to take additional evidence to see if the claimant could meet her burden of proof.

Respondent submits these cases show how the decision below limits itself, and is manageable by the federal courts and the agency.

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[12]It should be noted that the Secretary had filed an appeal to the District of Columbia Circuit of this decision, but voluntarily dismissed her appeal.

[13]It should be noted that the Secretary had filed an appeal to the Fourth Circuit of this decision, but voluntarily dismissed her appeal.

In sum, the decision below is consistent with prior decisions of this Court, and is not in conflict with decisions of any other courts of appeal. Alternatively, the estoppel issue itself need not be reached as the decision can be affirmed on the ground that an agency is bound to follow its own regulations. Judge Friendly's vigorous dissent, on the law, is premised to a significant degree on a factual dispute which must be resolved against him if the writ were to be granted. Since review could thus turn on the analysis of the particular facts of the case, this is yet another reason to deny the Petition. Moreover, the decision not only does not threaten the sound administration of the Social Security program, but, as Judge Newman concluded "I concur not because the amount of money Mrs. Hansen seeks is small, but because it is only fair that it be paid." (App. A of Petition 47a).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Dated: 2/9/81

Zander B. Rubin, Esq.

Walter M. Morris, Jr., Esq.

Attorneys for Respondent

RESPONDENT'S APPENDIX A

Excerpts from transcript of Respondent's hearing before Administrative Law Judge 1a-10a

applications?

A. No, he was very short, very in a hurry.

Q. Did he suggest or encourage you in anyway to file a written application?

A. No, he did not.

Q. Did he explain to you the advantages of filing a written application?

A. No, he did not.

Q. Okay. And the reason you didn't file a written application at that time was what?

A. Because Mr. Connely told me that I wasn't illegible (sic) because I was divorced from my husband at the time of his death.

Q. And in your own mind, he made it very clear to you that you weren't eligible?

A. Yeah, I believed him.

RE-EXAMINATION OF CLAIMANT BY ADMINISTRATIVE LAW JUDGE:

Q. Do you remember exactly what he said?

A. Yes, I do.

Q. Tell me.

A. I was very put out because of the questions--

Q. Will you tell me what he said? Never mind about being put out.

A. He said me, "You were never married to the man, were you?"

Q All right, then what else did he say?

A Then he -- he said I was not illegible (sic) because I was divorced at the time of my husband's death. He said, "That's it, you were divorced. What was your marital statchus (sic)?"

Q All right.

ADMINISTRATIVE LAW JUDGE: Go ahead, Mr. Rubin.

CONTINUED EXAMINATION OF CLAIMANT BY MR. RUBIN:

Q Now, when you left Mr. Connely's office, did you talk to your mother right away?

A Yes, as soon as I came out the door.

Q And did you tell your mother what Mr. Connely had just said to you?

A Yes, I did.

Q Okay. Now, you've already testified as to why you filed in 1975, after receiving a booklet, is that correct?

A Yes, that is.

Q You mentioned that you called up this Enterprise-6039. Could you tell us what that is?

A That's Social Security office in Montpelier (phonetic), it's a toll-free number.

Q Uh-huh. And you -- when you made that telephone call, you -- what were you told?

A I was told that I was illegible (sic) for Mother's Benefits and had been since 1973, and I should go to the

ADMINISTRATIVE LAW JUDGE: And I won't go into the whether or not she's a divorced mother, the record will show that.

The Claimant, ANN RIEGEL HANSEN, having been first duly sworn, testified, as follows:

EXAMINATION BY ADMINISTRATIVE LAW JUDGE:

Q Going back to, Mrs. Hansen, May of '74, in the record you indicate that you talked to somebody in Newport or from Newport from the Social Security office, is that right?

A It was in June -- June 12th, your Honor.

Q All right, and was it -- was that person in Newport, or did you talk to him on the telephone -- how did you talk to him?

A I went into the Social Security office in Newport--

Q Uh-huh.

A --and spoke to the field man, Dan Connely (phonetic).

Q All right.

A And I went in to file a form for Mother's benefits -- Divorced Mother's Benefits.

Q All right, now, was he alone there?

A Yes, he was.

Q And was it in the morning, or afternoon, or when

was it?

A. No -- excuse me -- but it was in the afternoon, your Honor.

Q. And how long did you spend there?

A. It couldn't have been any longer than between 10 to 15 minutes, if it was that long.

Q. And did you discuss with him anything else other than filing that application?

A. No. He asked who I was, and I told him, "Ann Riegel Hansen" and that my boys had a claim there, two Riegel boys, and I -- I told him that I had heard that I was illegible (sic) for Divorced Mother's Benefits, I was not--

Q. That you were eligible or not?

A. That I was.

Q. All right.

A. And I was there to file a form,--

Q. Uh-huh.

A. --and he -- well, I (UNINTILLIGIBLE)--

Q. What did he tell you?

A. He asked me -- he said, "Were you ever married to the guy?" And I -- I just looked at him, and--

Q. What'd you tell him?

A. --he repeated the question again, because I was stunned, and I said, "Well, I can cross the street and go over to the City Clerk's office and get you a marriage

certificate." And he said, "Oh, no, no," he says, "that won't be necessary."

Q. All right, what else did he say?

A. And then he asked me what my marital statchus (sic) was at the time,--

Q. Uh-huh.

A. --"Were you divorced?" And I said, "Yes," and he said, "Well, that's it," his hands went up in the air, he said, "That's it then, that's why you're not illegible (sic)."

Q. Well, wait, did he say just, "That's it," or what else did he say, as near as you recall, after he said, "That's it," what -- what else did he say by way of explanation?

A. He said, "That's it, it's because you're divorced that you're not illegible (sic)."

Q. Did he say that you were not eligible?

A. He said I was not illegible (sic) to file a form for Mother's Benefits.

Q. Now, did he say the words that, "You aren't eligible?"

A. Yes, your Honor.

Q. Or did he just say, "That's it"?

A. He said, "That's it," and he said, "You're not illegible (sic) to file a form because you are divorced at the time."

Q. And did he give you any other explanation?

A. No, he didn't.

Q. Uh-huh. And was there anything else said at your meeting?

A. No.

Q. Either before or after the conversation that you're telling me now?

A. You mean while I was in Mr. Connely's office?

Q. Yes.

A. No.

Q. Any other discussion?

A. No, nothing else.

Q. And did you tell -- you told him you had a child or two--

A. I told him I had two sons.

Q. Uh-huh. Now, after that, when was the next contact that you made with the Social Security office or people?

A. In 1975.

Q. And do you remember what month?

A. Oh, gosh, I think it was May, your Honor.

Q. And that was in Newport?

A. Yes.

Q. And who did you see then?

A. I went back to the Social Security office after calling Enterprise-8539.

Q. What's that again?

Q How old, roughly?

A Oh, she was a middle-aged lady.

Q Tall or short, or fat or what?

A Oh, goodness, I think she was a little -- probably a little bit taller than I am -- I -- I can't tell you for sure, but--

Q Tell me this: You don't remember her name?

A No, I never asked her name, your Honor.

Q How do you remember Mr. Connely's name?

A Because he had given me a rude time.

Q A what?

A He had been rude to me.

Q Oh, you remember him because he was rude, you didn't remember the lady that took your application?

A No.

Q All right.

ADMINISTRATIVE LAW JUDGE: Go ahead, Mr. Rubin.

EXAMINATION BY MR. RUBIN:

Q When did your husband, Mr. Riegel, die?

ADMINISTPATIVE LAW JUDGE: We've got that -- we've got the death -- we got that.

BY MR. RUBIN:

Q And at the time of his death you were divorced, correct?

A Yes.

Baker, Humes & Burke Reporting, Inc.

Q And--

ADMINISTRATIVE LAW JUDGE: We have that, too.

BY MR. RUBIN:

Q Were you receiving support -- any support from him at the time of his death?

A No, I had never received support from him.

Q And the children started receiving benefits right after his death?

A Yes, shortly after.

Q Now, there came a time -- did there come a time when you went to the Social Security office to apply for benefits?

A Yes, in June of 1974.

Q And the Social Security contact sheets that are in evidence here list three names: Riegel, Riegel, and Hansen. Your last name is Hansen, is that correct?

A Yes.

Q And your two sons' last names are?

A Riegel.

Q And when you went into the Social Security office that day, did anyone go with you?

A My mother did.

Q And did she come into the room when you went in to speak to Mr. Connely?

A No.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Social Security Administration

TOE 110/120

Form Approved
OMB No. 72-R076

(Do not write in this space)

APPLICATION FOR MOTHER'S INSURANCE BENEFITS*

If you are applying as a widow, the information you furnish on this application will ordinarily be sufficient for a determination on the lump-sum death payment without the filing of any separate application.

1. Print name of deceased wage earner or self-employed person (*Herein referred to as the "deceased"*)	Enter his Social Security Number
Wallace M. Riegel Jr.	009 16 8115

I hereby apply for all insurance benefits payable to me under Title II of the Social Security Act, as amended.

2. Print your full name (*First name, middle initial, last name*)	Enter your Social Security Number (*If none or unknown, so indicate*)
Ann Riegel Hansen	009 24 7833

3. Enter your date of birth (*Show month, day, and year*)	Enter the name of the State or foreign country where you were born.
11-14-1937	Vermont

4. Enter your maiden name.
Dantagne

5. (a) Have you ever before filed an application for monthly social security benefits?	(b) Enter name of person on whose earnings record you filed other application.
☐ Yes (*If "Yes," answer (b), (c), (d), and (e).*) ☒ No (*If "No," go on to item 6.*)	

(c) Enter Social Security Number of person named in (b) (*If unknown, so indicate*)	(d) Are you now receiving benefits on this record?	(e) What kind of benefits are you receiving? (*For example, wife, disability, widow*)
— — | — — | — — — —	☐ Yes ☐ No	

6. (a) Are you so disabled now that you can't work, or was there some period during the last 14 months when you were so disabled that you could not work?	(b) Enter the date you became disabled (*Month, day, year*)
☐ Yes (*If "Yes" answer (b).*) ☒ No (*If "No" go on to item 7.*)	EXHIBIT 1

7. Enter below information about each of your marriages. Include information on your marriage to the deceased and any other marriages whether before or after you married the deceased.

	To whom married	When (*Mo., day, and year*)	Where (*Enter name of City and State*)
Your last marriage	Bruce Hansen	11-25-61	Newport
	How marriage ended	When (*Mo., day, and year*)	Where (*Enter name of City and State*)
	Divorce	4-16-64	Newport VT
Your next to last marriage	To whom married	When (*Mo., day, and year*)	Where (*Enter name of City and State*)
	Wallace Riegel Jr.	5-14-54	Newport VT
	How marriage ended	When (*Mo., day, and year*)	Where (*Enter name of City and State*)
	Divorce	4-8-60	Newport VT

(*Use "Remarks" space on last page for information about any other previous marriages.*)

*This may also be considered an application for survivors benefits under Section 5 of the Railroad Retirement Act and for Veterans Administration payments under Title 38 U.S.C. Veterans Benefits, Chapter 13 (which is, as such, an application for

SSN HOLDER: Wallace Riegel | W | M | 02/22/67

DIVIDEND | BASE PERIOD 50: 1951-1967 | SAE

EFF DATE	PIA	TYPE	MAX	EFF DATE	PIA	TYPE	MAX	EFF DATE	PIA	TYPE	MAX	EFF DATE	PIA	TYPE	MAX
05/74	218.30		370.90	06/74	226.50	1	384.70	06/75	240.70	1	415.50				

BIC	P F C	NAME OF CLAIMANT	DATE OF BIRTH	PF	DATE CLAIM FILED	S E C	RELATIONSHIP DATE	TYPE	REF SOCIAL SECURITY NO	S T A T	ENT DATE	E D C	BEN AMT	A D J	OTHER BEN AMT	A D J
E1		Ann R	11/14/37		05/07/75			DW	009-24-7833S		05/74		123.60 ~~165.00~~ 128.30			
											06/74		~~169.90~~			
2	S	WALLACE M	07/04/56		05/15/67						06/75		138.50			
											05/74		123.60			
											06/74		128.30			
1		MICHAEL C	04/29/58		05/15/67						06/75		138.50			
											05/74		123.60			
											06/74		128.30			
											06/75		138.50			

BENEFIT CONTINUITY FACTORS

BIC	YR	FAC	EARN	J 1	F 2	M 3	A 4	M 5	J 6	J 7	A 8	S 9	O 10	N 11	D 12

10a

7A. REP. PAYEE

TYPE	GDN	CUS	INST	NAM

8. LUMP SUM | F H EXPENSE

PAID AS FOLLOWS | REMAINS UNPAID

11. REMARKS | DO CODE

Montpelier Vt 024

~~MAX EXCEEDED ELIM OF SUPPORT REQ SC~~ AM AWD FOR C2 & C1 due to ent of E1 under sec 202(j)(1). To the extent cal. upto 163.80 and for 5/74 & 169.90 and for 6/74-6/75 for C2 & C1 protected under 202(j)(1)

CLAIMS REPRESENTATIVE: [signature] | DATE: 5/19/75

CLAIMS AUTHORIZER: [signature] | DATE: 5/15/75

This is to certify that this determination is based on supporting evidence on file [illegible] 6/4/75

J4

ENTITLEMENT DATA

BIC	NAME AND ADDRESS	DATE OF ENTITLEMENT	MONTHLY BENEFIT	LUMP-SUM DEATH PAYMENT
E1	47090A Ann R Hanson 59 Glen Rd Newport Vt 05855	05/74	123.80 123.60	
		06/74	~~169.90~~ 128.30	
	WALLACE M RIEGEL RR1 NEWPORT VT 05855	06/75	138.50	
		05/74	128.30	
		06/74	138.50	
	ANN R HANSEN GDN OF MICHAEL C RIEGEL 59 GLEN RD NEWPORT VT 05855	05/75	128.30	
		06/75	138.50	

EXHIBIT 2